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No.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1980

KAISER STEEL CORPORATION,
Petitioner,

v.

JULIUS MULLINS, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether a party to a contract provision, which he believes violates federal antitrust and labor laws and which for years no one had attempted to enforce, may raise the defense of illegality in an action brought for specific performance of the allegedly illegal provision.

2. Whether the Labor-Management Relations Act, which in Section 8(e) provides that certain types of contract clauses are "unenforcible and void," is properly construed as both granting federal court jurisdiction to enforce collective bargaining agreements and precluding federal courts from deciding whether the clauses they are called upon to enforce violate Section 8(e).*

3. Whether the Employee Retirement Income Security Act of 1974 authorizes a federal court to award attorneys' fees to a plaintiff in an action brought to enforce a collective bargaining agreement when the plaintiff did not allege a violation of ERISA or of any pension or welfare plan subject to ERISA and when Section 301 of the Labor-Management Relations Act, which expressly provides federal court jurisdiction in actions to enforce col-

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* Because this proceeding draws into question the constitutionality of the Labor-Management Relations Act, 29 U.S.C. §§ 158(e), 185 (1976), as construed by the court of appeals, and neither the United States nor any department, office, agency, officer or employee thereof is a party, 28 U.S.C. § 2403(a) may apply, and this petition has been served upon the Solicitor General. No court of the United States as defined by 28 U.S.C. § 451 has, pursuant to 28 U.S.C. § 2403(a), certified to the Attorney General that the constitutionality of the Labor-Management Relations Act has been drawn into question.

lective bargaining agreements, does not authorize an award of attorneys' fees.**

** The following were parties to the proceedings in the court of appeals: Kaiser Steel Corporation (appellant) and Julius Mullins, John J. O'Connell, and Paul R. Dean, in their capacities as trustees of the United Mine Workers of America Health and Retirement Funds (appellees). Harrison Combs has since replaced Julius Mullins as a trustee.

The Henry J. Kaiser Family Foundation has a 17.1% ownership interest in Kaiser Steel Corporation. Kaiser Steel Corporation has no other parent corporation or affiliate and no partially owned subsidiaries.

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IN THE

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OCTOBER TERM, 1980

No.

KAISER STEEL CORPORATION,
Petitioner,

v.

JULIUS MULLINS, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Kaiser Steel Corporation ("Kaiser Steel") respectfully petitions for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit to review that court's judgment of September 17, 1980, in *Mullins* v. *Kaiser Steel Corporation*, No. 79-1463.

OPINIONS BELOW

The opinion of the court of appeals is not yet officially reported and appears as Appendix A to this Petition.[1] The order of the district court from which appeal was taken and the district court's Memorandum Opinion, which is reported at 466 F. Supp. 911, appear as Appendix B. The judgment sought to be reviewed appears as Appendix C. The orders of the court of appeals denying Kaiser Steel's petition for rehearing and suggestion for rehearing en banc appear as Appendix D.

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[1] The Appendices are bound together in a separate volume.

JURISDICTION

The judgment of the court of appeals was entered on September 17, 1980. A timely suggestion for rehearing en banc was denied, by a vote of 7 to 4, on November 12, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves Sections 8(e) and 301 of the Labor-Management Relations Act, 29 U.S.C. §§ 158(e), 185 (1976); Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2 (1976); and Sections 502(a) and 502(g) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1132(a), 1132(g) (1976). These statutory provisions are set forth in Appendix E.

STATEMENT OF THE CASE

This appeal from a summary judgment involves the 1974 nationwide collective bargaining agreement between hundreds of coal producers, including numerous steel companies such as Kaiser Steel, and the United Mine Workers Union ("UMW"). The 1974 agreement established the terms and conditions of employment for Kaiser Steel's coal mining employees and, among other things, required Kaiser Steel to make payments to the Trustees of the UMW health and retirement funds ("Trustees") based on the hours worked and coal produced by Kaiser Steel's employees. Kaiser Steel made all of these payments. *See* Appendix ("App.") A at 2a-3a, 6a.

The agreement, in a separate provision commonly referred to as the "purchase-of-coal" clause, also required Kaiser Steel to pay to the Trustees a penalty on all coal that it purchased from coal producers whose employees were not represented by the UMW, even if no UMW producer was able to supply it with comparable coal and even if the non-UMW producers paid wages and benefits

as high as those paid under the UMW agreement. *See* App. A at 3a; court of appeals' Joint Appendix ("J.A.") at 296.[2]

The purchase-of-coal clause evolved from a labor dispute tracing back to the 1940s, when the UMW initiated efforts to deter or bar trade in coal produced by persons other than UMW mine operators. The purpose of the clause is to aid the UMW in its efforts to organize non-UMW coal producers by putting economic pressure on UMW signatories to refrain from buying non-UMW coal. App. A at 35a-36a; J.A. at 296.[3]

Steel companies negotiating with the UMW have consistently objected to the purchase-of-coal clause as an overbroad and illegal restraint on their purchases of non-UMW coal. The steel companies' resistance to the purchase-of-coal clause succeeded until 1971, when, after a long strike, they yielded to the UMW's demands. The penalty clause was made a part of the 1971 collective bargaining agreement and has since been included in the 1974 agreement and the 1978 agreement, which is currently in effect.[4] The Trustees and the UMW apparently intend to include the purchase-of-coal clause in future collective bargaining agreements as well. *See* n.20, *infra*.

From the outset, Kaiser Steel believed that the purchase-of-coal clause violated the federal labor and anti-

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[2] The amount of money that Kaiser Steel was called upon to pay by the purchase-of-coal clause was one-sixth the amount Kaiser Steel paid to the funds based on coal produced by its employees.

[3] The purchase-of-coal clause has no other purpose: The payments called for by the clause are not designed, or needed, to meet the financial requirements of the funds to which they are to be made; nor is the amount of such payments related either to work performed by UMW employees or to the differences, if any, between UMW and non-UMW wage and benefit levels. *See* J.A. at 280-81, 296-97.

[4] The purchase-of-coal clause in the 1978 agreement is the subject of an action currently pending before the United States District Court for the District of Columbia. *Combs* v. *Kaiser Steel Corp.*, No. 80-2545 (Oct. 6, 1980).

trust laws and refused to make the penalty payments or to account for its purchases of non-UMW coal. The UMW and the Trustees knew for years that Kaiser Steel regularly purchased non-UMW coal from Mid-Continent Coal and Coke Company ("Mid-Continent") without making the penalty payments called for by the purchase-of-coal clause, but they nevertheless adhered to a policy of not attempting to enforce the clause.[5] The UMW and the Trustees themselves doubted the legality of the purchase-of-coal clause, and they feared that attempts to enforce it would subject them to a "rash of antitrust suits."[6]

On April 11, 1978, four months after expiration of the 1974 agreement, the Trustees abandoned their policy of nonenforcement and filed this suit for specific performance of the purchase-of-coal clause. They alleged jurisdiction under Section 301 of the Labor-Management Relations Act ("LMRA"), 29 U.S.C. § 185, and Section 502 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132, and set forth in their complaint a single cause of action—the assertion that Kaiser Steel breached the 1974 agreement in effect between 1974 and 1977 by failing to make payments and reports in accordance with the purchase-of-coal clause. Kaiser Steel defended the suit on the grounds that the

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[5] App. A at 6a & n.3; J.A. at 294 & n.5, 652-53 & n.3. Because Kaiser Steel's mines produce only high volatile coal and its steel manufacturing process has always required a blend of high volatile coal and mid-volatile coking coal, Kaiser Steel has always had to purchase mid-volatile coking coal from another coal producer. Since 1959, Kaiser Steel has purchased virtually all of its mid-volatile coal requirements from Mid-Continent. J.A at 293.

The UMW has repeatedly tried, without success, to organize Mid-Continent's employees. Mid-Continent's coal mining employees are represented by another coal mining union, and its wages and fringe benefits have consistently been higher than those provided under UMW collective bargaining agreements. *Id.* at 293-94.

[6] Memorandum of Chairman, Board of Trustees (July 19, 1974); *see* Reply Brief for Appellant Kaiser Steel Corporation at 8 n.12 (September 19, 1979).

purchase-of-coal clause violated Section 8(e) of the LMRA, 29 U.S.C. § 158(e), and Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2; that payment of the sums called for by that clause would be illegal; and that the clause is void and unenforceable. *See* App. B at 73a; J.A. at 292, 324.

The Trustees moved for summary judgment on the ground that, even if illegal, the purchase-of-coal clause should be enforced against Kaiser Steel. The district court granted the Trustees' motion and, without briefing or discussion, ordered Kaiser Steel to pay the Trustees' attorneys' fees. App. B at 80a.

The court of appeals affirmed the summary judgment. In an opinion by Judge Mikva (joined by District Court Judge Flannery), the panel held that the district court properly refused to entertain Kaiser Steel's defense of illegality and that Kaiser Steel's only recourse, long since foregone, was to have brought a declaratory judgment action against the union or to have filed a charge with the National Labor Relations Board at the outset of the contract period challenging the lawfulness of the purchase-of-coal clause. App. A at 9a, 18a, 28a. The panel also upheld the district court's award of attorneys' fees on the ground that Section 502 of ERISA, which authorizes fee awards, and Section 301 of the LMRA, the statute on which plaintiffs based their claim below but which does not authorize fee awards, are not "so surgically discrete than an action to compel welfare fund contributions required by the terms of a collective bargaining agreement cannot be maintained under both sections." *Id.* at 34a.

Circuit Judge Wilkey dissented from both holdings, finding "no reason in law or logic why any court should enforce a contract clause which plainly violates the law specifically designed to prohibit such clauses" and no statutory authority for the fee award. App. A at 35a, 67a. With four judges dissenting, the court of appeals denied Kaiser Steel's suggestion for rehearing en banc.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' UNPRECEDENTED DECISION ABOLISHING THE DEFENSE OF ILLEGALITY IN CONTRACT ENFORCEMENT ACTIONS RAISES IMPORTANT QUESTIONS OF FEDERAL LAW AND POLICY AND IS CONTRARY TO DECISIONS OF THIS COURT.

It has always been the law, until this case, that courts do not enforce illegal contracts and that an allegation that a contract provision is illegal states a good defense to an action brought to enforce that provision. *E.g.*, *McMullen* v. *Hoffman*, 174 U.S. 639, 654 (1899).[7] As this Court reiterated recently, a defense of illegality is available and will bar a court from enforcing an illegal contract provision "where the judgment of the Court would itself be enforcing the precise conduct made unlawful" by federal law. *Kelly* v. *Kosuga*, 358 U.S. 516, 520 (1959).[8]

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[7] "The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract." 174 U.S. at 654. *See Gibbs* v. *Consolidated Gas Co.*, 130 U.S. 396, 412 (1889) (" 'The rule of law . . . is of universal operation, that none shall, by the aid of a court of justice, obtain the fruits of an unlawful bargain.' ").

[8] The court of appeals misread *Kelly*. In *Kelly*, the defendant entered into a lawful agreement to purchase onions from the plaintiff. After taking delivery of the onions, the defendant refused to pay for them on the ground that a separate agreement not to deliver onions to the futures market—the so-called "nondelivery agreement"—violated the antitrust laws. In rejecting this defense, the Court said that, "while *the nondelivery agreement* between the parties *could not be enforced* by a court, if its *unlawful* character under the Sherman Act be assumed, it can hardly be said to enforce a violation of the Act to give legal effect to a completed sale of onions at a fair price." 358 U.S. at 521 (emphasis added). It went on to hold that "*where*, as here, *a lawful sale* for a fair consideration *constitutes an intelligible economic transaction in itself*," it may be enforced. *Id.* (emphasis added).

The court of appeals read *Kelly* to mean that the defense of illegality "does not lie against a contract that is 'an intelligible

In this case, however, the court of appeals held that Kaiser Steel's allegation that the purchase-of-coal clause violates the federal labor and antitrust laws did not state a defense. In so doing, the court of appeals ignored the fact that Section 8(e) and the Sherman Act prohibit not only entering into illegal contract clauses like the purchase-of-coal clause, but also complying with such clauses; indeed, the court ordered specific conduct—the payment of a penalty or surcharge pursuant to the purchase-of-coal clause—that those laws proscribe. Moreover, on the basis of sweeping new principles, the court departed from the heretofore uniform rule that federal courts do not act in aid of unlawful contracts.

The decision below is wrong and likely to be of far-reaching precedential significance. This Court should grant certiorari to prevent the undermining of Congressional policy and the erosion of the prior decisions of the Court.

A. The Court of Appeals Ignored Important Congressional Policies by Ordering Conduct That Is Proscribed by the LMRA and the Sherman Act.

Enforcement of the purchase-of-coal clause would require the "precise conduct" that both Section 8(e) of the LMRA and the Sherman Act proscribe. The court of appeals overlooked this consequence of its decision because of an erroneous construction of Section 8(e) and the Sherman Act that fails to take account of the purposes and meaning of those laws. Indeed, a central flaw

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economic transaction in itself' " (App. A. at 13a) and held that, because the purchase-of-coal clause is "intelligible," its unlawfulness is no bar to its enforcement. But *Kelly* does not mean that an illegal contract may be enforced so long as it is "intelligible" to the enforcement court or that the illegality defense applies only to contracts that are not intelligible. *Kelly* means that courts should look to the substance of the parties' agreement to see if the *lawful* portion is "an intelligible economic transaction in itself"—*i.e.*, separable from the illegal portion; if the lawful agreement is severable, it may be enforced. But illegal agreements—like the nondelivery agreement in *Kelly* and the purchase-of-coal clause here—may not be enforced.

in the court's decision is that it substituted its sense of public policy for the policies embodied in federal statutes.

First, requiring Kaiser Steel to pay a penalty for dealing with Mid-Continent would cause the very injury that Section 8(e) of the LMRA is principally intended to prevent. Section 8(e) makes unlawful—indeed, "unenforcible and void"—any provision in a collective bargaining agreement that prohibits or penalizes an employer for doing business with another person and has as its purpose or effect achievement of union objectives outside the employer's work unit.[9] Such provisions are known as "hot cargo" agreements.

The purpose of Section 8(e)'s proscription of hot cargo agreements is to prevent a union from using its bargaining power in one work unit to advance union objectives (such as organizing non-union employees) outside that work unit. *National Woodwork Manufacturers Association* v. *NLRB*, 386 U.S. 612, 622-26, 633-35 (1967). Congress intended in part to protect employers outside the work unit (like Mid-Continent) with whom a union has a dispute from being subjected to a boycott by other, "neutral" employers (like Kaiser Steel). But Congress' principal purpose was to protect the *neutral employers* from being caught in the middle of the union's dispute with others. As this Court repeatedly emphasized in *National Woodwork*, the "touchstone" and "central theme" of Section 8(e) is to protect "neutral employers" from being burdened with hot cargo clauses. *Id.* at 624-25, 627, 635, 645.

Focusing exclusively on the effect of its decision on Kaiser Steel's supplier, Mid-Continent, and the fact that the 1974 agreement had expired, the court of appeals concluded that enforcement of the purchase-of-coal clause would not enforce unlawful conduct because it could no longer cause Kaiser Steel to boycott Mid-Continent during

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[9] *See, e.g., Raymond O. Lewis*, 148 N.L.R.B. 249, 253 (1964); *Lithographers Local 19*, 130 N.L.R.B. 985, 987-88 (1961), *enforced in pertinent part*, 309 F.2d 31 (9th Cir. 1962), *cert. denied*, 372 U.S. 943 (1963).

the term of the contract. But while compelling the payments called for by the penalty clause in the 1974 agreement would not deprive Mid-Continent of the sales it had made to Kaiser Steel during the term of that agreement, it would penalize Kaiser Steel for having done business with Mid-Continent during that period.[10] Thus, by enforcing the unlawful purchase-of-coal clause, the court below would cause the precise injury that Section 8(e) is primarily intended to prevent—harm to a neutral employer, Kaiser Steel. The decision undermines the very purpose for which Section 8(e) was enacted and cannot be reconciled with the teachings of *National Woodwork.*

Second, the purchase-of-coal clause violates the Sherman Act by imposing an unlawful surcharge or penalty on purchasers who, like Kaiser Steel, buy some of their coal requirements from non-UMW producers. It is unlawful both because it impairs the ability of non-UMW producers to compete with UMW producers for sales to companies such as Kaiser Steel and because it penalizes such companies when they choose their suppliers on the basis of competitive merit.[11]

In requiring that Kaiser Steel make the penalty payments called for by the purchase-of-coal clause, the court

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[10] It would also cause *future* boycotts of non-UMW coal producers like Mid-Continent. The successor to the 1974 agreement and other UMW agreements contain, and likely will contain in the future, penalty clauses that are in all pertinent respects identical to the purchase-of-coal clause at issue in this case. *See* n.20, *infra.* In making purchasing decisions, employers subject to these penalty clauses will undoubtedly be influenced by the decision below, and employers who otherwise would buy coal from non-UMW suppliers will be encouraged by the penalty clause to boycott those suppliers.

[11] Because it is unlawful to require purchasers to make payments pursuant to such a clause, those who are required to make such payments may recover three times their amount as treble damages under the antitrust laws. *See, e.g., Response of Carolina, Inc.* v. *Leasco Response, Inc.*, 537 F.2d 1307 (5th Cir. 1976); *Carpa, Inc.* v. *Ward Foods, Inc.*, 536 F.2d 39 (5th Cir. 1976).

of appeals would thus subject Kaiser Steel to an injury—payment of an unlawful penalty—that the antitrust laws are intended to prevent. It would also give Kaiser Steel an incentive to boycott non-UMW producers such as Mid-Continent in the future. The court's decision would thus cause the precise conduct made unlawful by federal law and deprive Kaiser Steel and the public "of the protection which Congress has conferred." [12]

B. The Court of Appeals' Sweeping Decision Will Eliminate the Defense of Illegality and Have a Significant and Widespread Impact on Future Cases in Which Parties Seek Judicial Aid in Enforcing Unlawful Contracts.

The court of appeals' decision is wrong for another reason as well. Until this case, it has always been the law that courts will not enforce an unlawful contract provision, even if the court's remedy would not require any conduct that is itself illegal.[13] As this Court put it, courts will not lend their aid to a party "seeking to

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[12] *United States* v. *Mississippi Valley Generating Co.*, 364 U.S. 520, 563 (1961).

[13] In *McMullen* v. *Hoffman*, for example, this Court denied the plaintiff's suit for an accounting of partnership profits, even though the illegal bid fixing scheme that led to formation of the partnership by the two contractors had already been terminated and the accounting would not have brought about any of the effects that the law barring bid fixing was designed to prevent. As the Court stated: "In the case before us the cause of action grows directly out of the illegal contract, and if the Court distributes the profits it enforces the contract which is illegal." 174 U.S. at 660. *See also, e.g., Farbenfabriken Bayer A.G.* v. *Sterling Drug, Inc.* 307 F.2d 207 (3d Cir. 1962), *cert. denied*, 372 U.S. 929 (1963) (refusing request for an accounting and a share of the profits from an unlawful market allocation agreement); *Premier Electrical Constr. Co.* v. *Miller Davis Co.*, 291 F. Supp. 295 (N.D. Ill. 1968), *aff'd*, 422 F.2d 1132 (7th Cir.), *cert. denied*, 400 U.S. 828 (1970) (denying enforcement of subcontracting agreement conditioned on illegal bid fixing arrangement). *Cf. Vendo Co.* v. *Lektro-Vend Corp.*, 433 U.S. 623, 646 n.3 (1977) (Stevens, J., dissenting) (noting that enforcement of contract clauses in such cases "would be to make the courts a party to the carrying out of one of the very restraints forbidden by the Sherman Act.").

realize the fruits of an agreement that appears to be tainted with illegality." *Continental Wall Paper Co.* v. *Louis Voight & Sons Co.*, 212 U.S. 227, 262 (1909).[14]

While the court of appeals in this case naturally focused on plaintiffs' particular claim against Kaiser Steel, its decision to depart from prior law rested on principles of policy and equity that will have significant, far-reaching impact. Adverting to notions of "unjust enrichment" and "waiver," the court of appeals held that Kaiser Steel was not entitled to raise the illegality defense because it had previously "ignored" the clause without pursuing *offensively* "its opportunities for a timely and direct adjudication of its rights." [15]

The court of appeals has for all practical purposes written the defense of illegality out of the law. By definition, a party can raise a *defense* of illegality only by waiting until suit is brought against it. Recognition of the illegality defense *always* relieves the defendant of an obligation he undertook and denies the plaintiff a benefit he bargained for. Yet, until now, the courts have uniformly held that an illegal contract provision will not be enforced, even if the plaintiff is seeking accrued

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[14] If that were not the law, a hired murderer, after performing his part of a contract to kill, could prevail in a suit for the contract price on the theory that compelling payment would not bring about a homicide and thus would not cause the very conduct forbidden by law. That result would be unthinkable.

[15] App. A at 18a. The court of appeals also evidently thought that this case was somehow different from all the rest because the clause had not previously been found to be illegal and the issue was therefore whether "the district court properly declined to entertain the defense" of illegality. *Id.* at 9a n.6. But this distinction has no support in law or policy; in almost all of the cases in which enforcement of a contract clause was refused on grounds of illegality the contract provision had not previously been found to be unlawful. *See, e.g., Continental Wall Paper Co.* v. *Louis Voight & Sons Co., supra; McMullen* v. *Hoffman, supra; Eiberger* v. *Sony Corp.*, 459 F. Supp. 1276 (S.D.N.Y. 1978), *aff'd*, 622 F.2d 1068 (2d Cir. 1980); *Revlon, Inc.* v. *Williams Int'l, Inc.*, 30 Misc. 2d 772, 214 N.Y.S.2d 456 (Sup. Ct. 1961).

obligations and the defendant has benefited from the contract as a whole and has received all the consideration due him.[16] No court before now has enforced an illegal agreement on the ground that the parties agreed to it and otherwise carried out their bargain or that nonenforcement would unjustly enrich the defendant.[17]

Nor has the illegality defense been rejected on grounds of waiver or estoppel.[18] On the contrary, until now it

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[16] *See, e.g.*, cases cited in n.17, *infra*, and *Associated Press* v. *Taft-Ingalls Corp.*, 340 F.2d 753 (6th Cir.), *cert. denied*, 382 U.S. 820 (1965). *See also National Electrical Contractors Ass'n, Inc.* v. *Howard P. Foley Co.*, 498 F. Supp. 552 (D. Md. 1980).

The cases on which the court of appeals relied are all very different. *Kelly* v. *Kosuga*, *supra*, and *Huge* v. *Long's Hauling Co.*, 590 F.2d 457 (3d Cir. 1978), *cert. denied*, 442 U.S. 918 (1979), upon which the court below principally relied, involved *lawful* contract clauses alleged by the defendants to be unenforceable because of "collateral" illegalities of *other* parts of the parties' agreements. *See also* App. A at 16a-17a, *citing Viacom Int'l, Inc.* v. *Tandem Productions, Inc.*, 526 F.2d 593, 598 (2d Cir. 1975) (whether a contract clause could be enforced would "depend on the court's perception of the contract [provision sought to be enforced] as a separate or 'collateral' entity or as an integral part of [the illegal provision], enforcement of which would effectuate 'the precise conduct made unlawful' " by the antitrust laws).

[17] Indeed, the courts have refused to enforce contract clauses that were found to be illegal where the plaintiff was suing for money owed for services previously rendered or goods previously supplied (*e.g.*, *McMullen* v. *Hoffman*, *supra*; *Farbenfabriken Bayer A.G.* v. *Sterling Drug, Inc.*, 307 F.2d 207 (3d Cir. 1962), *cert. denied*, 372 U.S. 929 (1963); *Kogod* v. *Stanley Co.*, 186 F.2d 763 (D.C. Cir. 1950); *Eiberger* v. *Sony Corp.*, 459 F. Supp. 1276 (S.D.N.Y. 1978), *aff'd*, 622 F.2d 1068 (2d Cir. 1980); *United States* v. *Bayer Co.*, 135 F. Supp. 65 (S.D.N.Y. 1955); *Revlon, Inc.* v. *Williams Int'l, Inc.*, 30 Misc. 2d 772, 214 N.Y.S.2d 456 (Sup. Ct. 1961); where the contract had already expired by its terms (*id.*); where the plaintiff had performed all of his obligations (*id.*); and even where the defendant himself benefited from that which made the contract clause illegal (*e.g.*, *McMullen* v. *Hoffman*, *supra*; *Farbenfabriken Bayer A.G.* v. *Sterling Drug, Inc.*, *supra*; *United States* v. *Bayer Co.*, *supra*).

[18] Applying waiver principles to strike the illegality defense is especially inappropriate in this case, for the court of appeals illogi-

has always been recognized that those doctrines have no place in an action brought to enforce a contract that is forbidden by statute or contrary to public policy. "Such a contract has no legal existence . . . and neither action nor inaction of a party to it can validate it and no conduct of a party to it can be invoked as an estoppel against asserting its validity." [19]

Because the court of appeals' rationale would justify—indeed, require—enforcement of an illegal contract clause in most if not all contract enforcement actions, the practical impact of the decision is likely to be substantial.[20]

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cally and unfairly allocated responsibility between the parties. Both the Trustees and Kaiser Steel long doubted the legality of the purchase-of-coal clause, and both long knew of Kaiser Steel's refusal to comply with it. Both could have brought suit sooner, but both chose not to. If either party should be charged with the risk of inaction, it is the Trustees. Only they knew whether they would reverse their longstanding policy of nonenforcement, making litigation regarding the lawfulness of the purchase-of-coal clause necessary and appropriate.

[19] *Cecil B. DeMille Productions* v. *Woolery*, 61 F.2d 45, 49 (9th Cir. 1932). As this Court recognized in *United States* v. *Mississippi Valley Generating Co.*, 364 U.S. 520, 565 (1961), "even if [nonenforcement of an illegal contract] . . . in a given case may seem harsh . . . that result is dictated by the public policy manifested by the statute." *See also, e.g., Sola Elec. Co.* v. *Jefferson Elec. Co.*, 317 U.S. 173 (1942); *Nathan* v. *Tenna Corp.*, 560 F.2d 761 (7th Cir. 1977); *Inter-Continental Promotions, Inc.* v. *Miami Beach First Nat'l Bank*, 441 F.2d 1356 (5th Cir.), *cert. denied*, 404 U.S. 850 (1971); *Doherty* v. *Bartlett*, 81 F.2d 920 (1st Cir.), *cert. denied*, 298 U.S. 676 (1936).

[20] The court's determination has already been relied on by the Trustees in actions brought to enforce against Kaiser Steel the purchase-of-coal clause in the 1978 collective bargaining agreement (*see* n.4, *supra*) and to enforce against another steel company the penalty clause in the 1974 agreement (*Mullins* v. *Reitz Coal Co.*, No. 78-0715 (D.D.C. Mar. 23, 1979)). Plaintiffs and the UMW apparently intend to continue to insist upon the inclusion of these penalty clauses in future contracts. They settled recent litigation with U.S. Steel Corporation only after extracting from U.S. Steel

If left to stand, the court's decision would provide an incentive for parties to include unlawful provisions in their agreements in the expectation that the defense of illegality will not be available if enforcement is sought. It would thus promote unlawful conduct and erode the public interests served by the federal laws proscribing such conduct.

Moreover, under the rule established below, parties to contracts of questionable legality would be induced to initiate legal proceedings—even if no efforts to enforce the contracts or secure compliance have been made or could be foreseen—solely to ensure that they will not later be estopped from arguing that the contracts are illegal. The decision would thus lead to a proliferation of what may be wholly unnecessary lawsuits.

II. THE COURT OF APPEALS' HOLDING THAT FEDERAL COURTS HAVE NO JURISDICTION TO DECIDE WHETHER CONTRACT CLAUSES THEY ARE ASKED TO ENFORCE VIOLATE SECTION 8(e) OF THE LMRA IS ERRONEOUS AND CONFLICTS WITH PRIOR DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS.

The court of appeals held that the district court did not have jurisdiction to determine whether the purchase-of-coal clause violated Section 8(e), even in an action brought for specific performance of that clause. Only the NLRB, said the court, can decide in the first instance whether a contract clause violates Section 8(e). The court's construction of the LMRA is erroneous, probably unconstitutional, and in conflict with decisions of at least two other circuits.

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a promise that it would not challenge the lawfulness of the penalty clause, by litigation or negotiation, in either the 1974 Agreement or any other agreement in the future. *United States Steel Corp.* v. *International Union, UMW*, No. 75-1966, Order and Memorandum of Agreement (D.D.C., filed Oct. 5, 1977).

A. The Court of Appeals Has Misunderstood Section 8(e) and the Prior Decisions of This Court.

Congress provided in Section 8(e), in language that could not be more clear, that all hot cargo clauses [21] shall be "unenforcible and void." [22] That language is an unmistakable statutory command that hot cargo provisions are void at their inception and are at all times unenforceable by the federal courts.[23] As Congressman Griffin, the sponsor of the House bill, said of a provision that became Section 8(e):

> "Subsection (b) of Section 705 *not only* makes it an *unfair labor practice* to enter into a 'hot cargo' agree-

[21] With exceptions, for the construction and garment industries, not relevant in this case.

[22] *See* National Labor Relations Board, 2 Legislative History of Labor-Management Reporting and Disclosure Act of 1959 ("Legis. Hist.") at 1258, 1290, 1361 (1959) (remarks of Senators Kennedy and Goldwater).

That Congress intended to prohibit the enforcement of hot cargo clauses is made clear also by the contrast of the main clause of Section 8(e) with the "garment industry" proviso to the section, which states that Section 8(e) is not intended to *"prohibit the enforcement"* of those garment industry agreements that are exempted from the general prohibition of hot cargo clauses. 29 U.S.C. § 158(e) (emphasis added).

[23] Senator Goldwater, one of the original sponsors of the bill that became Section 8(e), described the law as rendering hot cargo provisions "unenforcible and void for all purposes" and added:

> "This means that *such contractual clauses are per se illegal. It is unlawful for either party* even to execute such an agreement, to insist that the other party bargain about or enter into it, to use any form of coercion or restraint—economic or otherwise—*to compel the other party to enter into it, or to live up to it even if his refusal to do so is in breach* of a voluntary agreement to abide by the agreement, and finally, such breach does not constitute a good cause of action in a suit at law to recover damages for the breach or to secure specific performance of the agreement." 2 Legis. Hist. at 1857 (emphasis added).

See also remarks of Representative Kearns, *id.* at 1861.

ment, *but also*, makes it clear that such contracts are '*void and unenforcible.*'" National Labor Relations Board, 2 Legislative History of Labor-Management Reporting and Disclosure Act of 1959 at 1523 (1959) (emphasis added).[24]

The court of appeals' construction of Section 8(e) is both less straightforward and untenable. According to the court of appeals, the "unenforcible and void" language does not prohibit the enforcement of illegal hot cargo clauses or, as the court put it, provide a "remedy of contract avoidance"; it serves instead only to prevent a union from obtaining specific performance of an agreement by an employer to boycott a third party supplier.[25]

The court made two errors. First, the court overlooked the primary purpose of Section 8(e), which, as noted, is to protect neutral employers like Kaiser Steel, not boycotted third parties. It makes no sense to construe the most explicit and powerful part of Section 8(e) to protect only parties whose interests were not of primary concern to Congress.

Second, and more important, by treating the case as if Kaiser Steel had initiated litigation seeking a "remedy of contract avoidance," the court erroneously got sidetracked on the primary jurisdiction issue. It was plaintiffs, not Kaiser Steel, who sought a remedy in this case; the court should thus have asked whether plain-

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[24] *See also*, H.R. No. 1147, 86th Cong., 1st Sess. 39 (1959) (the statute "makes any such agreement heretofore or hereafter executed unenforcible and void"); remarks of Congressman Rhodes, 2 Legis. Hist. at 1581 ("not only . . . an unfair labor practice . . . but also . . . void and unenforceable").

[25] App. A at 22a. The court actually said that it construed the language to prevent unions "from obtaining specific performance of a 'hot cargo' clause . . . ." *Id.* at 23a. Since plaintiffs in this case sought, and obtained from the lower courts, specific performance of the hot cargo clause here at issue, the court's stated principle would compel a result different from that which it reached. Presumably, therefore, the court meant that the "unenforcible and void" language was intended to prohibit specific performance of actual refusals to deal, not all forms of specific performance of illegal hot cargo clauses.

tiffs had any right to the specific performance remedy they sought. Had the court asked that question, it would have understood that it could not enforce the purchase-of-coal clause without deciding whether the clause violated Section 8(e)—whether, in other words, it created any valid, legal obligations.

Where a contract provision, such as an illegal hot cargo clause, is void as against public policy, it has no existence in the eyes of the law: It is "nugatory and without legal effect." [26] As this Court stated recently, where a statute provides that a contract is "void," "[*a*]*t the very least* Congress must have assumed that [the statute] could be raised *defensively in private litigation to preclude the enforcement* of . . . [the] contract." *Transamerican Mortgage Advisory, Inc.* (*TAMA*) v. *Lewis*, 444 U.S. 11, 18 (1979) (emphasis added).

Congress intended no departure from these principles in enacting Section 8(e) and providing that hot cargo clauses are "unenforcible and void." [27] Indeed, prior deci-

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[26] *Boatland, Inc.* v. *Brunswick Corp.*, 558 F.2d 818, 823 (6th Cir. 1977). *See also Miller* v. *Ammon*, 145 U.S. 421, 427 (1892) (It is "the ordinary rule that an act done in disobedience to the law creates no rights of action which a court of justice will enforce."); *Laborers' Int'l Union Local 107* v. *Kunco, Inc.*, 344 F. Supp. 626, 630 (W.D. Ark. 1972), *rev'd on other grounds*, 472 F.2d 456 (8th Cir. 1973) (where a contract is prohibited by law, "no cause of action for an alleged breach thereof can be maintained.").

[27] The rationale for precluding federal courts from deciding labor law issues—that only the NLRB is competent to decide them—has no application to the issues that arise under Section 8(e). Federal courts are empowered by Section 303 of the LMRA, 29 U.S.C. § 187, to decide the same issues. Section 303 authorizes federal courts to hear suits for damages brought by anyone alleging injury from a violation of Section 8(b)(4)(B) of the LMRA, and the question raised by Kaiser Steel's defense—whether the purchase-of-coal clause is designed to serve union objectives outside Kaiser Steel's work unit—is the same question that courts decide in actions arising under Section 303.

The court of appeals in this case evidently understood that federal courts are competent to decide hot cargo questions. As noted,

sions of this Court, although not directly deciding the question posed in this case, make clear that Congress' prohibition of hot cargo clauses can be raised defensively in private litigation to preclude the enforcement of such a clause.

In *National Woodwork Manufacturers Association* v. *NLRB*, *supra*, this Court recognized that Section 8(e) was added to the LMRA precisely to prevent

> "the possibility of damage actions against employers for breaches of 'hot cargo' clauses." 386 U.S. at 634.

And in *Connell Construction Co.* v. *Plumbers & Steamfitters Local 100*, 421 U.S. 616, 628 (1975), this Court—far from deferring to any exclusive NLRB jurisdiction—decided in the first instance that the contract in question there was illegal under Section 8(e).[28] The Court found "no legislative history in the 1959 Congress suggesting that labor-law remedies for § 8(e) violations were intended to be exclusive." *Id.* at 634. As Justice Stewart said, in a passage with which no Justice disagreed:

> "[T]he signatory of a purely voluntary agreement that violates § 8(e) is fully protected from any dam-

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it would permit federal courts to decide whether a contract clause violates Section 8(e) in an action brought to enforce the boycott itself.

[28] The issue in *Connell* was whether a contract clause violated the Sherman Act. In order to reach that issue the Court had to determine whether the clause comported with Section 8(e) and therefore was immune from antitrust scrutiny. The Supreme Court held that the clause violated Section 8(e) and therefore was not immune from scrutiny under the Sherman Act. 421 U.S. at 626, 634.

Had Kaiser Steel done what the court of appeals said it should have done—sought a declaratory judgment that the purchase-of-coal clause violates the Sherman Act—then under *Connell*, the court would have had to determine whether the purchase-of-coal clause violates Section 8(e) in order to decide whether it is immune from antitrust scrutiny. In other words, the court would have had to do precisely what the court of appeals said it had no power to do: examine in the first instance the legality of the purchase-of-coal clause under the LMRA.

> age that might result from the illegal 'hot cargo' agreement by *his ability simply to ignore the contract provision that violates § 8(e)* . . . . Since § 8(e) provides that any prohibited agreement is 'unenforceable and void,' *any union effort to invoke legal processes to compel the neutral employer to comply with his purely voluntary agreement would obviously be unavailing.*" *Id.* at 649 n.9 (emphasis added).

The court of appeals' decision not only misconstrues Section 8(e) itself but also runs afoul of a more general principle, manifest in a long line of decisions, that the doctrine of primary NLRB jurisdiction does not prevent a federal court from deciding labor law issues that arise in actions, like this one, "brought under independent federal remedies." *Id.* at 626.[29] It has thus repeatedly been held, for example, that a federal court may decide all relevant legal questions in actions, like this one, brought to enforce a collective bargaining agreement under Section 301 of the LMRA and that the exclusive jurisdiction doctrine has "no application" to such actions.[30] As this Court put it in *Motor Coach Employees*

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[29] *See De Magno* v. *United States*, No. 79-1852 (D.C. Cir. Sept. 24, 1980), in which the court held that "a court's lack of jurisdiction to decide an issue directly" when raised by a plaintiff "does not limit the court's power to decide the question to the extent it is relevant to the dispute over which it does have jurisdiction." Slip op. at 23. Indeed, a court may decide the merits of a defendant's claim that a contract which the court is called upon to enforce violates the law even if such question would normally lie within the exclusive jurisdiction of another forum. *Id. See also, e.g., Big Top Stores, Inc.* v. *Ardsley Toy Shoppe, Ltd.*, 64 Misc. 2d 894, 315 N.Y.S.2d 897 (Sup. Ct. 1970), *aff'd*, 36 A.D.2d 582, 318 N.Y.S.2d 924 (App. Div. 1971) (exclusive federal court jurisdiction over Sherman Act claims does not bar state courts from entertaining defenses of illegality under that Act).

[30] *E.g., William E. Arnold Co.* v. *Carpenters District Council*, 417 U.S. 12, 16 (1974); *Vaca* v. *Sipes*, 386 U.S. 171, 184 (1967); *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238, 245 n.5 (1962); *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95, 101 n.9 (1962). *See also Smith* v. *Evening News Ass'n*, 371 U.S. 195 (1962).

v. *Lockridge*, 403 U.S. 274, 300 (1971), "courts should be free to interpret and enforce collective bargaining agreements even where that process may involve condemning or permitting conduct arguably subject to the protection or prohibition of the National Labor Relations Act." [31]

The court of appeals' decision cannot be reconciled with this principle. Whatever may be the exclusive jurisdiction of the NLRB to grant remedies to employers like Kaiser Steel when they initiate litigation, it does not preclude a federal court from first looking to see if a contract clause it is asked to enforce is illegal before leaping to give the remedy of specific enforcement.

B. As Construed by the Court of Appeals, the LMRA Would Unconstitutionally Intrude Upon the Ability of the Federal Courts To Decide Contract Enforcement Actions.

The court of appeals' construction of Section 8(e) not only cannot be reconciled with the plain meaning of the statute, its legislative history or the prior decisions of this Court, but also raises a serious constitutional question. As construed by the court of appeals, the LMRA would unconstitutionally intrude upon the federal courts' ability to decide contract enforcement actions over which Congress gave them jurisdiction and thus offend the constitutional requirement of the separation of powers. This constitutional problem further demonstrates that the court of appeals' construction of the LMRA is erroneous and provides an additional reason for this Court to review the court of appeals' decision.

The parties and the lower courts agree that the district court had jurisdiction to entertain plaintiffs' action

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[31] *See also Charles Dowd Box Co.* v. *Courtney*, 368 U.S. 502, 513 (1962) ("Congress deliberately chose to leave the enforcement of collective bargaining agreements 'to the usual processes of the law.'").

under Section 301 of the LMRA.[32] But the court of appeals went further and held that, in such a Section 301 action, the court is to determine only "what a particular contract provision means and whether its obligations have been fulfilled"; whether the contract clause violates Section 8(e), it said, is for the NLRB to decide.[33]

But the NLRB is under no obligation to examine a contract provision, even on request of a party like Kaiser Steel. Indeed, as the court of appeals recognized, a decision by the general counsel of the NLRB not to commence an enforcement proceeding in response to an employer's complaint challenging the lawfulness of a hot cargo clause is not reviewable by any court.[34]

Thus, by holding that a federal court may not determine the lawfulness of a contract clause under Section 8(e) in an enforcement action under Section 301, the court has left employers like Kaiser Steel with the prospect that they may be compelled to comply with a contract clause the lawfulness of which *no court* has been able to review. The court of appeals' decision also means that a federal court must, pursuant to Section 301 of the LMRA, enforce an illegal hot cargo clause even though *neither it nor any other court* has ever been able to pass on the lawfulness of the clause.

The court of appeals' conclusion that Congress intended the LMRA to preclude consideration of the legality of a contract that it authorized the federal courts to enforce raises grave constitutional problems. It has

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[32] Section 301 vests in the district courts jurisdiction over "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . ."

[33] App. A at 23a-24a.

[34] *Vaca* v. *Sipes*, 386 U.S. 171, 182 (1967); *Associated Builders and Contractors* v. *Irving*, 610 F.2d 1221, 1226 (4th Cir. 1979), *cert. denied*, 100 S. Ct. 294 (1980); *National Alliance of Postal and Federal Employees* v. *Klassen*, 514 F.2d 189, 197 (D.C. Cir.), *cert. denied*, 423 U.S. 1037 (1975).

been clear for over a hundred years that Congress may not grant a federal court jurisdiction to decide a case and then tell it how to decide,[35] and Article III of the Constitution precludes withdrawing controlling questions of law from federal enforcement courts.[36] In the absence of a compelling showing in the LMRA or its legislative history that Congress intended to bar a court from considering the legality of contracts it is called upon to enforce, the statute should not be read to produce this impermissible result.

The Article III question raised here is of crucial importance to our constitutional scheme; and the LMRA itself—and Sections 301 and 8(e) in particular—have widespread application. The court of appeals' decision, which misapprehends the meaning of Section 8(e) and imputes to Congress an intention to encroach impermissibly on the power of the federal courts fully to decide contract enforcement actions properly before them, should not be allowed to stand.

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[35] *E.g.*, *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1872). *See also, e.g.*, *De Magno* v. *United States*, No. 79-1852, Slip op. at 24 (D.C. Cir. Sept. 24, 1980) (to permit an agency "to enlist the coercive power of the courts to enforce a money judgment against an individual without the basis of the . . . claim ever being subject to judicial scrutiny . . . is contrary to the very notion of an ordered government of checks and balances"); *United States* v. *Howard*, 440 F. Supp. 1106 (D. Md. 1977), *aff'd on other grounds*, 590 F.2d 565 (4th Cir.), *cert. denied*, 440 U.S. 976 (1979).

[36] As Professor Hart put it in his famous "Dialogue":

> "Name me a single Supreme Court case that has squarely held that, in a civil enforcement proceeding, questions of law can be validly withdrawn from the consideration of the enforcement court where no adequate opportunity to have them determined by a court has been previously accorded. When you do, I'm going back to re-think *Marbury* v. *Madison*."

Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1378-1379 (1953), *reprinted in* H. Hart and H. Wechsler, The Federal Courts and the Federal System (2d Ed. 1973) at 330, 341 (footnote omitted).

C. The Court of Appeals' Decision Conflicts with Decisions of at Least Two Other Circuit Courts.

The court of appeals' decision that a federal court may not in the first instance decide whether a contract clause violates Section 8(e) conflicts with the decisions of at least two other circuit courts.

The Second Circuit is the most squarely contrary: It has held that a federal court, in an action under Section 301 to enforce a clause in a collective bargaining agreement, may itself determine that the clause violates Section 8(e) and therefore refuse to enforce it. *United Optical Workers Union Local 408* v. *Sterling Optical Co.*, 500 F.2d 220 (2d Cir. 1974), *aff'g United Optical Workers Union Local 408* v. *Sterling Optical Co.*, 74 Lab. Cas. (CCH) ¶ 10,304 at 17,067 (E.D.N.Y. 1973).[37] In another case, the Second Circuit stated that "resort to the court to enforce a provision invalid under § 8(e) will almost always be futile, given the section's declaration that such provisions are unenforcible [sic] and void." *Carrier Air Conditioning Co.* v. *NLRB*, 547 F.2d 1178, 1191 n.15 (2d Cir. 1976), *cert. denied*, 431 U.S. 974 (1977). Indeed, the Second Circuit has even held that the primary jurisdiction doctrine does not bar a district court from entertaining an employer's suit seeking a declaratory judgment that a clause in a collective

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[37] In *Botany Indus., Inc.* v. *Clothing Workers*, 375 F. Supp. 485 (S.D.N.Y.), *vacated as moot*, 506 F.2d 1246 (2d Cir. 1974), the employer defended a union's Section 301 suit to enforce an arbitrator's award directing the employer to comply with a clause in their collective bargaining agreement on the ground that enforcement of an award would be improper because the cause violated Section 8(e). The court rejected the union's contention that the court lacked jurisdiction to hear the Section 8(e) defense, relying on the holding of *Hurd* v. *Hodge*, 334 U.S. 24, 35 (1948), that "[w]here the enforcement of private agreements would be violative of [the public policy of the United States as manifested in the Constitution, treaties, and federal statutes], it is the obligation of courts to refrain from such exertions of judicial power."

bargaining agreement violates Section 8(e). *Todd Shipyards Corp.* v. *Industrial Union of Marine and Shipbuilding Workers Local 39*, 344 F.2d 107 (2d Cir. 1965).

The court of appeals' decision in this case is also in conflict with the law of the First Circuit, which has rejected the contention that the NLRB has exclusive jurisdiction to decide unfair labor practice issues in the first instance. In *Local 1896, IAM* v. *Brake and Electric Sales Corp.*, 279 F.2d 590 (1st Cir. 1960), the First Circuit affirmed a district court's refusal to enforce a union security and arbitration clause in a collective bargaining agreement on the ground that enforcement would involve a violation of Section 8(a)(3) of the LMRA.

The law of the Third Circuit is less clear. In *Huge* v. *Long's Hauling Co.*, 590 F.2d 457 (3d Cir. 1978), *cert. denied*, 442 U.S. 918 (1979), the court stated, without having to decide, that a federal court may not initially decide an issue of labor law illegality.[38] But in *Lewis* v. *Seanor Coal Co.*, 382 F.2d 437 (3d Cir. 1967), *cert. denied*, 390 U.S. 947 (1968), the same court made clear that a contract clause which is itself an illegal hot cargo clause may not be enforced.

One other circuit court agrees with the court of appeals in this case. In *Waggoner* v. *R. McGray, Inc.*, 607 F.2d 1229 (9th Cir. 1979), the Ninth Circuit ruled that the NLRB's primary jurisdiction precludes federal courts from acting as the initial arbiters of unfair labor practice charges in actions brought under Section 301.

In short, five circuit courts have addressed the question whether and when federal courts may entertain

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[38] It was not argued in *Huge* that the contract provision there sought to be enforced was itself unlawful; rather, the employer defended on the ground that a wholly separate provision violated Section 8(e). The court thus had no need to resolve the Section 8(e) issue in order to dispose of plaintiffs' contract claim.

defenses of labor law illegality in contract enforcement actions. They have reached widely varying and conflicting conclusions. The issues are important, and this Court should grant certiorari to resolve the conflict in the circuits.

III. THE COURT OF APPEALS' DECISION AFFIRMING THE AWARD OF ATTORNEYS' FEES STRETCHES ERISA JURISDICTION FAR BEYOND CONGRESS' INTENT, FLOUTS THIS COURT'S DECISION IN *ALYESKA*, AND PROMISES TO STIMULATE PENSION AND ATTORNEYS' FEES LITIGATION IN THE FEDERAL COURTS.

In *Alyeska Pipeline Co.* v. *Wilderness Society*, 421 U.S. 240 (1975), this Court decided that federal courts may not award attorneys' fees to prevailing litigants unless authorized to do so by federal statute.[39] If the court of appeals' novel and cursory approach to statutory construction in general—and to the scope of ERISA jurisdiction in particular—is left standing, there will be a gaping loophole to this otherwise basic legal principle.

Plaintiffs' complaint alleges a single cause of action—failure by Kaiser Steel to comply with the 1974 collective bargaining agreement. Plaintiffs alleged, and Kaiser Steel and the lower courts agreed, that the district court had jurisdiction under Section 301 of the LMRA to provide plaintiffs with the relief they sought. No statute, however, authorizes an award of attorneys' fees in suits brought under Section 301.[40]

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[39] Only Congress has the "power and judgment" to determine when attorneys' fees are appropriate; the judiciary is not free to "pick and choose among plaintiffs and the statutes under which they sue and to award fees in some cases but not in others . . . ." *Id.* at 269.

[40] *E.g.*, *General Tel. Co.* v. *International Bhd. of Electrical Workers Local 89*, 554 F.2d 985, 987 (9th Cir. 1977); *National Ass'n of Letter Carriers* v. *United States Postal Service*, 590 F.2d 1171, 1176 & n.5 (D.C. Cir. 1978); *Western Elec. Co.* v. *Communi-*

Plaintiffs also claimed jurisdiction under Section 502 of ERISA, 29 U.S.C. § 1132, which (unlike the LMRA) authorizes courts to award attorneys' fees. Section 502(g), 29 U.S.C. § 1132(g). But plaintiffs did not allege that Kaiser Steel had violated ERISA, and they did not even put in the record any plan regulated by ERISA. There was, therefore, no jurisdiction under ERISA. *See* 29 U.S.C. § 1132(a)(3).[41]

ERISA is not intended to regulate collective bargaining agreements or "to control every aspect of the employer-employee relationship or every promise made to employees."[42] Its purpose is to protect beneficiaries from incompetent or dishonest fiduciaries and "to curb the funding and disclosure abuses of employee pension and welfare benefit plans by establishing minimum federal standards."[43]

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cation Equipment Workers, Inc., 554 F.2d 135, 138 (4th Cir. 1977); *International Bhd. of Electrical Workers Local 12* v. *A-1 Elec. Service, Inc.*, 535 F.2d 1 (10th Cir. 1976), *cert. denied*, 429 U.S. 832 (1976).

[41] *See also Smith* v. *Hickey*, 482 F. Supp. 644, 650 (S.D.N.Y. 1979) (jurisdiction under Section 502 of ERISA does not exist when "plaintiffs are not seeking redress for any violation of ERISA"). As Congress said, "civil actions may be brought [under ERISA] by a participant or beneficiary to recover benefits due under the plan, to clarify rights to receive future benefits under the plan, and for relief from breach of fiduciary duty." *Employee Retirement Income Security Act of 1974, Conference Report*, S. Rep. No. 1090, 93d Cong., 2d Sess. 327 (1974).

[42] *Taggert Corp.* v. *Efros*, 475 F. Supp. 124, 125 (S.D. Tex. 1979), *citing Wadsworth* v. *Whaland*, 562 F.2d 70, 73-74 (1st Cir. 1977), *cert. denied*, 435 U.S. 980 (1978).

[43] *Murphy* v. *Inexco Oil Co.*, 611 F.2d 570, 574 (5th Cir. 1980). Section 2 of ERISA describes the statute's purpose as follows:

> "[T]o protect . . . the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate

Plaintiffs do not need ERISA jurisdiction to enforce the collective bargaining agreement; Section 301 of the LMRA provides a fully adequate remedy for their contract claim.[44] Apparently, plaintiffs alleged ERISA jurisdiction only in order to provide a basis for claiming attorneys' fees.[45] If left to stand, the court of appeals' decision awarding attorneys' fees as if there were ERISA jurisdiction would encourage other litigants also "to add perhaps unjustified ERISA claims to their suits in the hopes of recovering attorneys' fees after prevailing on other claims." [46]

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remedies, sanctions, and ready access to the Federal Courts." 29 U.S.C. § 1001.

See Cate v. *Blue Cross & Blue Shield*, 434 F. Supp. 1187, 1190 (E.D. Tenn. 1977) ("It is clear from this declaration of policy, and from the structure of the Act, that the focus of Congress was on the 'conduct, responsibility and obligation' of those who were responsible for administering employee benefit plans.").

[44] *Cf. International Brotherhood of Teamsters* v. *Daniel*, 439 U.S. 551, 570 (1979) ("Congress believed that it was filling a regulatory void when it enacted ERISA."). This Court has recently granted certiorari in another case to examine the relationship between other provisions of the LMRA and ERISA. *Amax Coal Co.* v. *NLRB*, 614 F.2d 872 (3d Cir. 1980), *cert. granted*, 49 U.S.L.W. 3515 (1981).

[45] *Compare Cowan* v. *Keystone Employee Profit Sharing Fund*, 586 F.2d 888, 892 (1st Cir. 1978) *quoting Bell* v. *Hood*, 327 U.S. 678, 682 (1946).

[46] *Fase* v. *Seafarers Welfare and Pension Plan*, 79 F.R.D. 363, 366 (E.D.N.Y. 1978). The court of appeals cites nine instances in which suits brought to compel contributions to pension funds joined ERISA claims and resulted in an award of attorneys' fees: *Mullins* v. *Reitz Coal Co.*, No. 78-0715 (D.D.C. March 23, 1979); *Huge* v. *Reid*, 468 F. Supp. 1024 (N.D. Ala. 1979), *aff'd mem.*, 615 F.2d 916 (5th Cir. 1980); *Huge* v. *Maximeadows Mining Co.*, 459 F. Supp. 267 (N.D. Ala. 1978); *Bugher* v. *Southland Fabricators and Erectors, Inc.*, 452 F. Supp. 870 (W.D. La. 1978); *Sheet Metal Workers Nt'l Pension Fund* v. *Young's Roofing, Inc.*, No. 77-1849 (D.D.C. May 3, 1978); *Huge* v. *Overly*, 445 F. Supp. 946 (W.D. Pa. 1978); *IAM Nt'l Pension Fund* v. *Ward La France Truck Corp.*, C.A. 77-1206 (D.D.C. Feb. 1, 1978); *Bugher*

Indeed, one can imagine all kinds of interests future litigants will have in claiming ERISA jurisdiction in actions otherwise properly brought under other statutes —to take advantage of ERISA remedies[47] or its relaxed amount in controversy or venue requirements,[48] for example, as well as attorneys' fees. If plaintiffs can take advantage of ERISA jurisdiction whenever they can state a claim under another statute that the court finds not "surgically discrete" from ERISA—whatever that means—ERISA will have become a license for a flood of lawsuits Congress never envisioned and did not authorize when it enacted that statute.

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v. *Frash*, 98 L.R.R.M. 3010 (S.D. Ind. 1977). *See* App. A at 34a n.14.

Since the court of appeals' decision, there have been at least two other cases filed in the District of Columbia Circuit in which plaintiffs seek attorneys' fees under ERISA for violations of collective bargaining agreements. *See Sheet Metal Workers' Nt'l Pension Fund* v. *General Metal Products*, No. 80-3328 (D.D.C. filed Dec. 31, 1980); *Sheet Metal Workers' Nt'l Pension Fund* v. *Supreme Metal Fabricators*, No. 80-3327 (D.D.C. filed Dec. 31, 1980).

[47] *See e.g. Cate* v. *Blue Cross & Blue Shield*, 434 F. Supp. 1187, 1190-91 (E.D. Tenn. 1977) (ERISA does not confer jurisdiction over "an insurer whose only relation to an employee beenfit plan is its contract to guarantee insurance benefits to participants in the plan"); *McNeil* v. *Suffolk Cty Painters Ins.*, 431 F. Supp. 387, 388 (E.D.N.Y. 1977) (ERISA does not confer jurisdiction over an action "brought to enforce the arbitration clause of [an] employment contract between [the] trustees and [the] fund's administrator").

[48] ERISA allows for federal jurisdiction "without respect to the amount in controversy or the citizenship of the parties," 29 U.S.C. § 1132(f), and provides for venue "in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found," 29 U.S.C. § 1132(e)(2).

CONCLUSION

For the reasons stated above, certiorari should be granted to review the judgment of the court of appeals.

Respectfully submitted,

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